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No. 87-1956
SUPREME COURT OF THE UNITED STATES
October Term 1988

Anthony M. Frank,
Postmaster General of the United States,
et al.

Appellants

v.

Minnesota Newspaper Association, Inc.,

Appellee

On appeal from the
United States District Court,
District of Minnesota

Brief Amicus Curiae of the American Civil Liberties Union and Minnesota Civil Liberties Union

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INTEREST OF THE AMICI[1]

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of more than 250,000 members, dedicated to preserving and protecting the fundamental rights of the people of the United States. The Minnesota Civil Liberties Union (MCLU) is one of its state affiliates, a private, non-profit, non-partisan, membership-supported organization having approximately 4,000 members in

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1 Letters from both parties consenting to the participation of Amici in this appeal are set forth in the brief Amicus Curiae of the Minnesota Civil Liberties Union respecting jurisdictional statements, previously filed with this court.

the State of Minnesota. Its purpose is the protection of the rights and liberties preserved by the Minnesota and United States constitutions, including freedom of speech and of the press.

SUMMARY OF ARGUMENT

As a threshold matter, the Court should dismiss this appeal because it does not present a case or controversy. Recent congressional legislation has legalized all the speech at issue in this case, both commercial and non-commercial.[2]

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2 See Charity Games Advertising Clarification Act of 1988, Pub. L. No. 100-625, 102 Stat. 3205 (1988); Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988).

Moreover, the parties themselves do not dispute the very question at issue in this case, the prohibition in 18 U.S.C. § 1302 on the mailing of newspapers containing "prize lists." Indeed, the Government's argument is premised on the notion that Section 1302 should not be read to apply to editorials, news stories, or documentaries about lotteries. Similarly, MNA's brief to the Court disavows any interest in the application of the "prize list" prohibition beyond the scope of news and editorials. The appeal therefore presents no live case or controversy for the Court to resolve.

The Court must also reject the Government's proposed interpretation of the "prize list" prohibition. The language of the statute simply will not sustain the Government's attempts to narrow it to the Government's view of permissible restrictions on commercial speech. What is suggested is not merely an interpretation of the statute, but a complete rewriting, a task better left to Congress. Moreover, even if the Government's proposed interpretation were tenable in the abstract, the Government has not in practice applied the statute with that narrow view. The record in this case, although sparse, clearly demonstrates

attempts by the Postal Service to influence newspapers' news and editorial content pursuant to Section 1302, in direct contradiction to the Government's purported position here. Accordingly, the trial court correctly ruled that the "prize list" prohibition on its face impermissibly restricted non-commercial speech, regardless of whether such restrictions on commercial speech would have been permissible.

In addition, the ACLU agrees with appellees that the redefinition of the commercial speech test proposed by the Government is unsupported by this Court's past decisions and, if

accepted, would seriously erode important First Amendment freedoms. We also agree with the position, advanced by other amici, that the total ban embodied in Section 1302 would not be justified even if this were a commercial speech case. To avoid unnecessary repetition, those arguments have not been repeated here.

ARGUMENT

I. This appeal does not present the court with a case or controversy for resolution.

The Court should dismiss this appeal on the ground that the appeal no longer presents a justiciable case or controversy. Two separate factors combine to make the mootness of this

appeal clear. First, since the District Court's decision from which the appeal is taken, Congress has passed two separate Acts that between them remove all the prohibitions on speech complained of in plaintiff's original Complaint. Those statutes, the Charity Games Advertising Clarification Act of 1988, Pub. L. No. 100-625, 102 Stat. 3205 (1988), and the Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988), remove the prohibitions of 18 U.S.C. § 1302 on speech relating to lotteries conducted by not-for-profit organizations and Indian tribes respectively. Second, the MNA's

complaint addresses only speech concerning such non-profit and tribal gaming. See Complaint at ¶ ¶ 6-10, 15-18.[3] All the prohibitions that were at issue in this case have thus been removed.[4]

The Court thus has no justiciable controversy before it. See New Jersey State Lottery Commission v. United States, 491 F.2d 219 (3d Cir. 1974), vacated and remanded, 420 U.S. 371

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3 Joint App. at 4-6.

4 The fact the removal of the prohibitions will not actually take effect until May 7, 1990, see Pub. L. 100-625, § 5, does not create a justiciable controversy here. The Minnesota Newspaper Association states in its brief that it is willing to wait until the effective date and will not contest the prohibitions in the meantime. MNA Brief at 5.

(1975). Although the Government correctly points out that Section 1302 continues to apply to speech concerning private, for-profit lotteries, this appeal does not present that case; neither the Complaint nor the decision of the court below raises or addresses that issue. This case involves (and has always involved) only speech concerning non-profit and tribal lotteries, and, as demonstrated by the MNA's voluntary dismissal of its cross-appeal concerning the prohibition on the advertising of such lotteries, Congress has resolved that issue.

Perhaps even more significantly, however, the briefs of the respective

parties demonstrate that the parties themselves do not disagree about the result that the Court should reach in this matter. The Government concedes here that:

> . . . Section 1302 should not be read to apply to other forms of commentary about lotteries, such as editorials, news stories, or documentaries.

Brief of Federal Parties at 30.[5]

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5 Notably, the Government took a considerably different position in the court below. There the Government argued

> To the extent the matter excluded from the mails includes any list of prizes awarded, and the court construes this to include lists contained in

(FOOTNOTE Continued On Next Page)

Correspondingly, the MNA's brief withdraws the MNA's objection to the prize list clause as it relates to speech other than news stories and editorials. MNA Brief at 5.

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5 (FOOTNOTE Continued From Previous Page)

> a news report or in an editorial, defendants submit that the restrictions still survive scrutiny under the First Amendment since the restriction is necessary to serve compelling state interests -- namely, the three interests already advanced to justify the statutory scheme under the Commercial Speech Doctrine -- and is narrowly drawn to achieve that end. [citation omitted]

Defendants' Memorandum of Law and Response to the Memoranda Filed in Support of Plaintiff's Motion for Summary Judgment at 5.

Accordingly, both parties appear to be in agreement with the holding of the District Court:

> Accordingly, this court holds that section 1302 does not authorize the exclusion from the mails of newspapers containing general news reports or editorial comment regarding lotteries.

677 F. Supp. 1400, 1409. In short, despite the nominally adversarial briefs submitted to the Court, both parties apparently would reach the same result on the actual issue presented for review. Under these circumstances, there is no controversy before the Court, and the appeal should be dismissed. See Deakins v. Monaghan, 484 U.S. _____, 98 L.Ed.2d 529, 538-39

(1988); United States v. Munsingwear, Inc., 340 U.S. 36, 39-40 (1950).

II. Section 1302 has not been and cannot reasonably be interpreted as the Government proposes.

If the Court reaches the merits of the controversy, amici respectfully submit that the constitutionality of Section 1302 must be resolved based on the language of the statute and the manner in which it has been applied, rather than relying on the inventive reinterpretation put forth by the government for the first time in its brief to this Court.

Specifically, the government now argues -- contrary to the position it took earlier in this litigation -- that

Section 1302 "should be construed to apply only to prize lists that constitute commercial speech." Appellants' Brief at 22. Leaving aside for a moment the novelty and inappropriateness of the Government's proposed new definition of commercial speech,[6] both the language of the

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6 The difficulties with and the unprecedented nature of the Government's proposed definition of commercial speech is addressed in detail in the brief of Appellee Minnesota Newspaper Association. The Court has long and repeatedly rejected the "financial interest" litmus test for commercial speech urged by the Government here. See, e.g., New York Times v. Sullivan, 376 U.S. 254, 266 (1964). In fact, the contrary doctrine is so firmly established that one might be tempted to treat the Government's argument as a throwaway if it were not the sum and substance of the Government's appeal. Amici are mystified

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statute and the demonstrated practice of the Post Office belie the Government's purported narrow construction.

A. The language of the statute does not support the Government's interpretation.

Section 1302 reads in relevant part:

> Whoever knowingly deposits in the mail or sends or delivers by mail:
>
> . . .

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6 (FOOTNOTE Continued From Previous Page)

as to why the Government pushes this issue, not raised in the district court, so forcefully when the issue has no bearing on the result in this case.

> any newspaper . . .
> containing any list of
> the prizes drawn or
> awarded by means of any
> such lottery, gift
> enterprise or scheme,
> whether said list
> contains any part or all
> of such prizes;
>
> . . .
>
> shall be fined not more
> than $1,000 or imprisoned
> not more than two years,
> or both; and for any
> subsequent offense shall
> be imprisoned not more
> than five years.

The Government urges that this statute be interpreted to apply only to

newspapers publishing paid prize lists[7] or prize lists for lotteries in which the newspaper has a financial interest. Government's Brief at 29. The Government relies on an extensive history of the nineteenth century lottery legislation, and claims to glean from that century-old history the conclusion that the legislation was not intended to affect news and editorial matter. The Government apparently reasons that because Congress did not

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7 The Government refers in its Brief to the possibility that a newspaper would be "paid to publish a list of lottery prizes or winning lottery numbers." Government Brief at 29. How this differs from the advertising permitted under the new Acts, see footnote 2 supra, the Government does not indicate.

believe that the Anti-Lottery Act violated the First Amendment, see Government's Brief at 26, and because the Government now apparently concedes that restrictions on news and editorial content would violate the First Amendment, Government's Brief at 30, Congress must not have intended to prohibit news and editorials concerning lotteries.

The government's exercise in deductive reasoning is flawed and unpersuasive. The fact that government counsel has now concluded -- midway through this litigation -- that news and editorial content cannot constitutionally be reached by

Section 1302 has no bearing on whether Congress intended to include such materials within its prohibition one hundred years ago. After all, the Government took the position in the court below that news and editorial content could be constitutionally prohibited under Section 1302.[8] Its recent change in position does not and cannot retroactively change the intent of Congress.

More significantly, however, the Government does not address the plain language of the statute. By its express terms, the statute prohibits

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8 See footnote 5 supra.

the mailing of "newspapers . . . containing <u>any</u> list of prizes." (emphasis added) It does not merely prohibit the mailing of newspapers containing paid prize lists or of containing prize lists of lotteries in which the newspaper has a financial stake, nor can such a limitation be reasonably inferred. Thus, the Government is not asking for a simple "interpretation," as its citations suggest;[9] the Government is asking

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9 For example, the primary case on which the Government relies, <u>United States v. 12 200 Ft. Rolls of Super 8 mm. Film</u>, 413 U.S. 123 (1973), is completely inapposite. As the Government itself notes, that case involves the

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the Court to rewrite the statute to include limitations that contradict the plain language of the statute as enacted. The court should reject the Government's attempt at statutory reconstruction and leave such matters to the deliberative process of Congress.[10]

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9 (FOOTNOTE Continued From Previous Page)

interpretation of a word in a federal statute so that the definition is consistent with prior Supreme Court case law. Here, the Government is not asking the court to define an ambiguous term, but to infer limitations on a statute that contradict the statute's plain language.

10 Interestingly, the Government has no difficulty applying the literal language of the

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B. Government practice does not support the Government's purported interpretation.

The Government's actual practice in applying the "prize list" prohibition in Section 1302 also contradicts the statutory interpretation now urged to this Court. As demonstrated by its own regulations and the facts in this case, the Government has routinely and

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10 (FOOTNOTE Continued From Previous Page)

statute in a manner contrary to the legislative history when the application suits the Government's purpose. Although acknowledging that the prize lsit prohibition historically addressed only lists of future prizes, the Government notes that the statutory language is not so restricted. The Government then urges that other policy reasons require the unrestricted reading of the statute, despite the historical inconsistency. See Government Brief at 23, n. 26.

systematically applied Section 1302 to newspapers' news and editorial content.

The most prominent example of the Government's broad day-to-day interpretation of the statute may be found in the U.S. Postal Service's Domestic Mail Manual, incorporated into the Code of Federal Regulations by 39 C.F.R. §§ 111.1 et seq. Courts have long recognized that statutes may not give those charged with applying them complete guidance, and that various agencies may therefore establish more detailed rules interpreting those statutes for day-to-day use. See, e.g., Rockville Reminder, Inc. v. United States Postal Service, 480 F.2d

4, 7 (2d Cir. 1973). Yet despite the opportunity to clarify the statutory prohibition on prize lists and to restrict it to noneditorial material, the Domestic Mail Manual uses the same broad language as its statutory parent:

> The following matter is unlawful mail matter:
>
> ***
>
> d. Any newspaper, circular, pamphlet, or publication of any kind containing . . . any list of prizes awarded in [a lottery or similar enterprise].

Domestic Mail Manual § 123.422(d). The narrow construction of Section 1302 urged to this Court thus differs considerably from the daily direction given to postal workers.

The record in the present case also demonstrates that the broad language of the Domestic Mail Manual has real life consequences. Paragraph 16 of Plaintiff's Complaint states, and the Government did not dispute for summary judgment purposes,[11] that

> [b]ecause the language of the statutes is vague and unclear and because the interpretation and application by the USPS have been inconsistent, arbitrary, and confusing, the MNA and its members have no clear idea as to what may be lawfully published and have found

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11 See Defendant's Memorandum of Law and Response to the Memoranda Filed in Support of Plaintiff's Summary Judgment Motion at 2 ("defendants are willing to assume that the material facts underlying this action are true." (footnote omitted).

> it necessary to avoid publishing not just advertising but nearly all copy involving gaming activities dependent on chance for fear of being subjected to the sanctions and penalties described above.
>
> Joint App. at 6. (emphasis added).

The USPS practice of going after news and editorial matter as well as advertising is also documented by the affidavits plaintiff submitted in support of its Motion for Summary Judgment. According to those affidavits, the U.S. Postal Service applies Section 1302 and the regulations in an unpredictable and inconsistent manner, inhibiting publication not only of advertising but

of news stories, feature stories, editorials, pictures, and community calendar items about lotteries.[12] The Government, on the other hand, has submitted no material whatever suggesting that its actual practices are in any way consistent with the interpretation that it now urges on this Court. Given this chasm between what the Government preaches and what it practices, this Court should reject the Government's proposed interpretation and affirm the decision of the trial court.

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12 See Affidavit of Linda I. Falkman, Joint App. at 14-16 (especially paragraphs 8, 9); Affidavit of Mark R. Anfinson, Joint App. at 17-20.

III. The trial court correctly held the prize list prohibition in Section 1302 unconstitutional on its face.

Contrary to the Government's characterization, the district court correctly interpreted the precedent concerning commercial and noncommercial speech and properly declared the prize list prohibition unconstitutional. The trial court looked at the plain language of the statute and the actual practices of the Government, both discussed above, and concluded that the statute applied to both commercial and noncommercial speech. The court then looked for a compelling Government reason for the restrictions on the noncommercial speech and found none.

The court therefore concluded that, regardless of whether the restriction on commercial speech was constitutionally permissible, the restrictions on noncommercial speech without a compelling Government interest rendered the prohibition facially unconstitutional.[13]

Contrary to the Government's assertion, the District Court did not conclude:

> that commercial speech and advertising are coterminous and that a law regulating something

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13 That a statute may have constitutional applications does not, of course, prevent it from being facially unconstitutional if it is "substantially overbroad." See, e.g., Secretary of State of Maryland v. J.H. Munson Co., 467 U.S. 947, 964-65, 81 L.Ed.2d 786, 104 S.Ct. 2839 (1984).

> other than advertising cannot be regarded as a regulation of commercial speech.

Government Brief at 29. On the contrary, the District Court specifically noted: "It is the context of the prize list, in advertisement or news reports, that determines the level of protection." 677 F.Supp at 1407.

It is also critical to note that the District Court's decision did not rely on drawing a fine-line definition of commercial speech, as the Government urges this Court to do, nor does resolution of this case require such draftsmanship. Instead of looking for the line beyond which prize lists would lose their character as noncommercial

speech, the District Court simply concluded that, wherever that line is, the news reports and editorial content restricted by the statute, the postal regulations, and the practice of the Post Office fall on the noncommercial side of it. Because the statute imposed impermissible restrictions on noncommercial speech, regardless of where the commercial-noncommercial line is drawn, the court held the statute facially unconstitutional.[14]

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14 The government's reliance on the greater/lesser rationale of Posadas de Puerto Rico Associates v. Tourism Co., 478 U.S. 328 (1986), fails once it is acknowledged that Section 1302 reaches non-commercial speech. See Meyer v. Grant, 108 S.Ct. 1886, 1893-94 (1988).

It is of course this aspect of the lower court's decision that prompts the Government's current attempts to revise history and backpedal on its interpretation of Section 1302. The record before the District Court was sufficient, however, to demonstrate to the trial court that the practice and policy of the Government was consistent with the plain language of Section 1302 and in fact restricted news coverage of lotteries. By ignoring the undisputed record before the trial court, the Government asks this Court to render a decision that could make sense only in the imagined world created between the covers of the Government's brief. The

Government also asks this Court to unnecessarily re-define commercial speech in terms that have no basis in precedent and will have no effect on the result of this case. The Court should reject the Government's broad invitation, resolve the case at hand, and affirm the District Court's decision.

CONCLUSION

The judgment of the District Court invalidating the prize list clause in 18 U.S.C. Section 1302 should be affirmed.

Respectfully submitted,

Dated January 20, 1989.

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